



purported exception to the “no direct action” rule.<sup>2</sup> Contrary to Intervenor’s assertions, *AIX* neither sets forth an exception to the “no direct action” rule nor otherwise supports Intervenor’s arguments.

3. In *AIX*, an insurer sued its insured and the third-party claimant in the same lawsuit. *AIX Specialty Ins. Co. v. BBL Invs., Inc.*, 2015 WL 12778400, at \*1. The third-party claimant asserted counterclaims against the insurer for, among other things, declaratory relief on coverage issues. *Id.* The insurer filed a motion to dismiss the claimant’s counterclaims, asserting the “no direct action rule.” *Id.*

4. Judge Kenneth Hoyt denied the insurer’s motion and found the no-direct action rule inapplicable because the insurer joined the third-party claimant in the first place:

Contrary to *AIX*’s position, the Court has subject matter jurisdiction over Moreno’s counterclaims because *AIX* is the party that brought him into the pending action. *See, e.g., Looney Ricks Kiss Architects, Inc. v. State Farm Fire & Cas. Co.*, 677 F.3d 250, 257 n.5 (5th Cir. 2012) (applying *Dairyland Ins. Co. v. Makover*, 654 F.2d 1120, 1123 (5th Cir. 1981), where court held that injured third parties, brought into declaratory judgment suit by plaintiff-insurer, had standing to appeal district court judgment denying coverage); *Commerce & Indus. Ins. Co. v. Alexander*, Civ. No. H–11–3939, 2012 WL 3046011, at \*2-3 (S.D. Tex. July 25, 2012) (Werlein, J.). In so doing, it conferred on Moreno standing to bring counterclaims against it.

Naming Moreno as a defendant has the additional effect of undercutting *AIX*’s “no direct action” argument. The “no direct action” rule is relevant when an injured third party brings suit, not when the insurer or the insured defendant seeks declaratory relief. *In re Essex Ins. Co.*, 450 S.W.3d 524, 527 (Tex. 2014) (distinguishing cases that fail to implicate “no direct action” rule “because in each of these cases, it

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<sup>2</sup> Doc. 23, *Intervenor’s Response to Plaintiff’s 12(b)(6) Motion to Dismiss Intervenor’s Counterclaim for Declaratory Relief*, at 4-6 and n.1.

was the insurer or the insured defendant, not the plaintiff, who sought declaratory relief, or the insured defendant's liability to the plaintiff had in fact been determined before the declaratory judgment suit was filed"). Unlike the plaintiffs in *Aviles v. Aguirre*, 292 S.W.3d 648, 649 (Tex. 2009) (per curiam), and *State Farm Cnty Mut. Ins. Co. v. Ollis*, 768 S.W.2d 722, 723 (Tex. 1989) (per curiam), Moreno did not file suit against AIX. AIX misguidedly relies on these cases to challenge jurisdiction over Moreno's counterclaims.

*Id.*

5. Unlike the insurer in *AIX*, Philadelphia did not join Intervenor in its first-party coverage lawsuit. Therefore, *AIX* does not support Intervenor's claimed right to proceed directly against Philadelphia in this case. Because Intervenor's direct action against Philadelphia violates Texas' "no direct action" rule, their claims for affirmative relief must be dismissed pursuant to Rule 12(b)(6).

## II.

6. Intervenor separately argue Philadelphia cannot bring its Rule 12(b)(6) motion because Philadelphia did not oppose Intervenor's Joint Motion to Intervene. This argument also lacks merit. Intervenor's Answer in Intervention and ensconced counterclaim were not accepted as pleadings in this case until after (a) the Court granted Intervenor's motion for leave and (b) Intervenor then re-filed the pleading in compliance with the Court's Order on the motion for leave.<sup>3</sup>

7. Under Rule 12(b)(6), a motion to dismiss for failure to state a claim is timely so long as it is filed prior to the movant's answer. FED. R. CIV. P. 12(b)(6).

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<sup>3</sup> Notably, the Court's Order granting the Joint Motion to Intervene permitted Intervenor to "...traditionally file their Answer in Intervention attached to the Motion on or before May 17, 2017." Doc. 19 (emphasis in original). In fact, the Order makes no mention of a counterclaim.

Because Philadelphia timely filed its Rule 12(b)(6) motion before answering Intervenor's counterclaim, the motion is properly before the Court. *Id.*; FED. R. CIV. P. 12(a)(1)(B).

**PRAYER**

Based on the foregoing, Plaintiff Philadelphia Indemnity Insurance Company asks the Court to dismiss with prejudice Intervenor Amy Arp and Kristen Harvey's counterclaims for declaratory relief, and that Plaintiff have all other and further relief, whether at law or in equity, to which it may be justly entitled.

Dated: May 30, 2017

Respectfully submitted,

/s/ William R. Pilat

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**CERTIFICATE OF SERVICE**

This is to certify that on May 30, 2017, a true and correct copy of the foregoing *Plaintiff's Reply to Intervenor's Response to Plaintiff's Rule 12(b)(6) Motion to Dismiss Intervenor's Counterclaim for Declaratory Relief* was forwarded to all other counsel of record, as listed below, by electronic transmission through the electronic case filing system of the United States District Court for the Western District of Texas:

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